courts below rightly rejected it for the reasons given in their judgments.

Their Lordships will dismiss the appeal. The appellants must pay the costs of the appeal.

Appeal dismissed.

Solicitors: *Parker Garrett & Co.; Titmuss, Sainer & Webb.*

MAJUMDER v. ATTORNEY-GENERAL OF SARAWAK

[P.C. (Lord Guest, Lord Upjohn and Lord Diplock) January 16, 1969]

[Privy Council Appeal No. 28 of 1967]

Administrative Law — Declaration — Contract of employment — Member of Overseas Civil Service — Whether designated officer — Inducement pay — Prerogative of Government in Council — Declaration cannot be made against person not party to proceedings.

The appellant in this case who had been appointed Medical Officer, Sarawak, claimed three declarations in the High Court as follows:— (a) that he is a member of Her Majesty's Overseas Civil Service; (b) that he is eligible for designation as a designated officer within the meaning of the schedule to the Overseas Civil Service Ordinance; and (c) that it would be unlawful to refuse him benefits such as inducement pay payable to a member of Her Majesty's Overseas Civil Service. At the trial an admission was made on behalf of the respondent that the appellant was a member of Her Majesty's Overseas Civil Service. The High Court ([1966] 1 M.L.J. 41) granted the second declaration and refused the third; the first declaration was not granted as it was held that there was no point in dispute. On appeal, the Federal Court ([1967] 1 M.L.J. 101) affirmed the decision of the learned trial judge as regards the first and third declarations, but further decided that the appellant was not entitled to the second declaration as the designation of an officer as a designated officer was a matter for the Secretary of State of the United Kingdom and as the Secretary of State was not a party to the action, the High Court was wrong in making the declaration that the appellant was a "designated officer". The appellant appealed to the Privy Council.

Held, dismissing the appeal: (1) the learned trial judge was right in exercising his discretion in not making the first declaration but in view of the circumstances there should be a recital that the order was made upon the court taking into account that the respondent conceded that the appellant had been a member of Her Majesty's Overseas Civil Service since December 1, 1958;

(2) as regards the second declaration it was within the discretion of the Secretary of State whether to designate an officer or not, and as the Secretary of State was not a party to the proceedings, the Federal Court was right in holding that the High Court could not make the declaration;

(3) as the question whether an officer is entitled to inducement pay is for the Governor in Council whose decision is final and as on the facts the terms of the contract of employment did not entitle the appellant to inducement pay, the learned trial judge was right in refusing the third declaration.

PRIVY COUNCIL.

E.F.N. Gratiaen, Q.C. (*R.K. Handoo* with him) for the appellant.

Sir Dingle Foot, Q.C. (*Montague Solomon* with him) for the respondent.

The judgment of the Lords of the Judicial Committee of the Privy Council was delivered by —

Lord Guest: The appellant was born in India in 1926, in Bengal, at Rangpur, which is now part of Pakistan. He obtained his MB, BS, from Calcutta University in 1948. After serving as a medical officer in the Indian Army he proceeded to England in the latter part of 1955 for post-graduate medical studies and he there obtained additional qualifications.

In March 1957 he was serving as Senior House Officer in the General Hospital, Rochford, Essex. While there he noticed an advertisement in the *British Medical Journal* for a post as Medical Officer, Sarawak. This advertisement stated that the appointment would be made on a permanent basis or a short-term contract and that expatriation pay (pensionable) would be payable at various rates. Subsequently, he submitted his application for the post and on his application form he stated that his present address was "C/o. General Hospital, Rochford, Essex", and that his permanent address was "C/o. Mr. K.C. Bose, 7 Central Road, Jadavper, Calcutta-32, India". This was the address of his father-in-law.

After being interviewed for the post he wrote to the Director of Recruitment, Colonial Office, asking that any future communications should be sent to the address in Calcutta on his application form, where he would be going. On 2nd May 1958 he received a letter from the Colonial Office informing him that he had been provisionally selected for appointment and that a formal letter of appointment would soon be sent to him. Eventually a letter dated 12th June 1958 was sent to him offering him an appointment on probation for three years as medical officer, Sarawak at a salary of $1,155. The letter informed him that any addition to his basic salary allowances would be payable at rates shown in the memorandum which was enclosed in the letter.

This memorandum headed "Conditions of Service in Sarawak", after stating the terms of appointment, dealt in paragraph 3 with the allowances which included education allowance, child allowance and outfit allowance. Paragraph 4 was in the following terms:—

"General Conditions of Service. An officer is subject to the General Orders of the Government in which he is serving, and to the Colonial Regulations for the time being in force in so far as the same are applicable. A copy of the current edition of the Colonial Regulations (Part I) is attached. The officer will be required to serve anywhere in Sarawak or in the State of Brunei."

Paragraph 7 was in the following terms:—

"Widows' and Orphans' Pensions: In accordance with the provisions of the Sarawak Widows' and Or-

phans' Pensions Legislation, male officers under the age of 54 and whether married or single are required to contribute to the Sarawak Widows' and Orphans' Pensions Fund. The rate of contribution is 5 per cent of salary plus inducement pay, subject to a maximum of $50 per month."

This letter was sent with the memorandum to the appellant through the Deputy High Commissioner in Calcutta and the appellant replied on 10th October 1958 accepting the offer under the terms and conditions set out in that letter and the memorandum. When the appellant reached Sarawak he received a letter dated 6th December 1958 informing him that His Excellency the Governor had been pleased to appoint him to be medical officer in Sarawak in Her Majesty's Overseas Civil Service with effect from 1st December 1958 on the conditions embodied in the Secretary of State's letter to him dated 12th June 1958 previously referred to. He was required, if he accepted the appointment, to send an undertaking in the form attached to the letter together with a Declaration of Secrecy. The appellant by letter dated 11th December 1958 undertook to accept the appointment subject to the rules and regulations of Her Majesty's Overseas Civil Service now in force or to any amendments which might be made from time to time. He was confirmed in his appointment as a medical officer with effect from 4th December 1961.

The appellant has brought this action against the Government of Sarawak by making the Attorney-General of Sarawak nominal defendant and claiming three Declarations as follows:—

1. Declaration of court that the plaintiff is, and has always been, a member of Her Majesty's Overseas Civil Service with effect from the 1st day of December 1958.
2. Declaration of court that the plaintiff is eligible for designation as a "designated officer" within the meaning of that phrase as defined in the schedule to the Overseas Service Ordinance (No. 15 of 1961).
3. Declaration of court that it would be unlawful to refuse to the plaintiff benefits such as inducement pay payable to a member of Her Majesty's Overseas Civil Service.

The writ was dated 28th August 1963.

The trial took place before the Honourable Mr. Justice Lee Hun Hoe and on 10th September 1965 the trial judge issued an order refusing the first and third declarations but granting the second. The appellant appealed to the Federal Court of Malaysia and there was a cross appeal by the respondent. On 18th October 1966 the Federal Court issued an order dismissing the appeal and allowing the cross appeal to the effect that the appellant was refused all three declarations. The greater part of the evidence considered by the trial judge was documentary, but the appellant and other witnesses gave oral evidence. The appellant stated that until August 1961 he was under the impression that his salary included inducement pay and when he realised that it was not included he submitted a petition dated 16th September 1961. This petition was answered by the Chief Secretary informing the appellant that he had consulted the Secretary of State for the Colonies who had replied that the appellant was not a member of Her Majesty's Overseas Civil Service.

While the defence as originally framed denied that the appellant was a member of Her Majesty's Overseas Civil Service, on the morning of the trial, namely 14th July 1965, counsel for the Attorney-General asked leave to amend the defence to the effect of inserting an admission that the defendant would regard the appellant, for the purposes of these proceedings, as if he had been enrolled in Her Majesty's Overseas Civil Service on 1st December 1958. At the same time there was produced to the trial judge a document of agreed facts. This was in the following terms:—

1. The defendant concedes that the plaintiff has been a member of Her Majesty's Overseas Civil Service since 1st December 1958. That is to say, the defendant does not oppose the plaintiff's claim contained in paragraph 1 of the statement of claim for a declaration of court to this effect.
2. The defendant admits that the appointment of the plaintiff as a Medical Officer in Sarawak in Her Majesty's Overseas Civil Service was published in the *British Medical Journal* and also in the *London Gazette*.

There followed three other paragraphs which are not material to this appeal.

Since these admissions moneys have been paid into the appellant's bank as compensation. In the judgment of the trial judge there occurs this passage:—

> "First I would like to say that in the light of the evidence as far as membership in HMOCS is concerned plaintiff had been shabbily treated by the colonial administration. It is a sad spectacle for the administration to inform a civil servant at the time of his appointment that he was a member of HMOCS and to turn round years later to say that he was not such a member."

Their Lordships have no hesitation in endorsing this criticism of the behaviour of the Colonial administration. They consider that the appellant was fully entitled in the circumstances which existed at the date of the raising of this action to include a declaration that he was a member of Her Majesty's Overseas Civil Service. This membership was a prerequisite of his further claims and in the face of the persistent denials by the respondent to admit his membership the appellant took the only course open to him. The tardiness of the respondent's admission was nowhere explained.

The appellant was refused the first declaration by both courts below and their Lordships cannot see any good grounds for disturbing their decisions. A declaration is always a discretionary remedy and the discretion of the trial judge will not be lightly interfered with. No grounds were put forward by the appellant upon which it could be said that the trial judge's discretion had been exercised upon improper grounds. The question of his membership of Her Majesty's Overseas Civil Service at the date when the trial judge had to make the order was academic. There was no dispute between the parties and the court will normally not grant declarations upon academic questions. Their Lordships however wish to add that in view of the behaviour of the Colonial Office and the respondent in these proceedings, they consider that the appellant is entitled to have some protection to safeguard his future rights. They are accordingly proposing to suggest in their report to the Head of Malaysia that the order of the trial judge should be varied to the extent of including in the order a recital of the admission by the respondent in the terms of the agreed statement of facts already referred to. Sir Dingle Foot appearing for the respondent did not seriously oppose such a variation of the order.

Their Lordships now pass to the second declaration which depends upon a consideration of the Overseas Service Ordinance, 1961 No. 15 of 1961. This Ordinance confirms an agreement made between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Sarawak. This agreement provides by clause 2 that in the event of the Government of Sarawak on or after the first day of April 1961 paying the allowances referred to in clause 3 of the agreement, the Government of the United Kingdom would reimburse the Government of Sarawak in the sums which are therein set out. Clause 3 provides that the allowances mentioned in clause 2 are (*a*) inducement allowance, (*b*) education allowance, and (*c*) passage allowance. By section 3 of the Ordinance there is charged upon the general revenues of Sarawak sums required for ensuring the payments in respect of "designated officers". By clause 1 of the agreement "designated officer" means an officer designated as such by a Secretary of State who is (1) an expatriate officer and (2) who is a member of Her Majesty's Overseas Civil Service. "Secretary of State" is defined by clause 1 of the agreement as one of Her Majesty's Principal Secretaries of State in the United Kingdom. As has been already stated, the trial judge granted the appellant this declaration, but in their Lordships' view this decision was rightly set aside by the Federal Court. There are in their Lordships' view objections to the granting of this declaration. In the first place, the Ordinance gives a designated officer no further rights than he would have under his contract; it merely provides for the financial arrangements between the two Governments in the event of designated officers being paid the allowances mentioned in the agreement. A declaration in the terms sought would therefore not advance the appellant's case. There is a further objection to the granting of this declaration that, in the terms of clause 1, a "designated officer" means an officer designated as such by the Secretary of State. The Secretary of State is not a party to these proceedings and moreover it is entirely within his discretion as to whether he designates an officer as such or not. He would not be compelled to do so. Their Lordships therefore conclude that the Federal Court were right in dismissing the appellant's appeal on this declaration.

Passing now to the third declaration, this is the only effective declaration which could assist the appellant in pursuit of his claim to inducement pay. "General Orders (Revised September 1956) of the Colony of Sarawak" provide by paragraph 4 that "General Orders have no force of law, except in so far as they set out the provisions of an Ordinance or Act of Parliament". By paragraph 7, General Orders "are not to be publicly quoted or referred to in communications to persons outside the Government Service".

Paragraph 192 is in the following terms:—

"(i) An officer in Division I, II or III shall be eligible for inducement pay if:

(*a*) on the occasion of his first appointment he was habitually resident in a country other than Borneo, Burma, Ceylon, China, the Federation of Malaya, Hong Kong, India, Indonesia, Pakistan, the Philippines, Siam or Singapore, and

(*b*) he has his principal family and social ties and general background in any such country, and

(*c*) his appointment to the Sarawak Civil Service represents a material degree of dislocation and disturbance in connection with the resulting change in his residence or place of work. Provided that an officer, who on the first occasion of his appointment had his permanent home in an overseas country but was resident in a country other than an overseas country solely for temporary purposes or for the purposes of his profession or calling shall be deemed to have been recruited from an overseas country.

(ii) If at any time any question arises whether any officer or class of officers is eligible for inducement pay, the decision of the Governor in Council shall be final."

In the memorandum attached to the contract documents it was provided that "An officer is subject to the General Orders of the Government in which he is serving".

At the trial the appellant endeavoured to suggest that he came within the category of officers entitled under the General Orders to and eligible for inducement pay. The trial judge, however, was not able to accept his evidence upon this matter. In the view of their Lordships the appellant must find his entitlement to inducement pay within his contract and outside the General Orders. Plainly he could only obtain inducement

pay under the General Orders if he was qualified under paragraph 192. It has been held by the trial judge that he did not so qualify and his counsel before the Board did not seriously maintain to the contrary.

However, a further and fatal objection to his claim under the General Orders is paragraph 192(ii) whereby any question as to whether an officer is entitled to inducement pay is for the Governor in Council whose decision is final.

Their Lordships therefore proceed to consider whether the appellant can succeed in his third declaration by reason of the terms of his contract. As has already been stated the original advertisement which excited the appellant's interest was extremely general but did refer to the fact that expatriation pay was payable and it is common ground that such pay is the same as inducement pay. The learned trial judge described this advertisement as no more than an offer to treat which formed no part of the offer of the Secretary of State contained in his letter of 12th June 1958. Their Lordships agree but in their opinion the position is more accurately expressed in the judgment of Harley A.C.J. who pointed out that a formal offer was made by the Chief Secretary of Sarawak to the appellant in a letter dated 6th December 1958 which was accepted by the appellant on 11th December 1958; and in their Lordships' opinion it is these documents which constituted the contract upon which the appellant must rely. While the letter of 6th December 1958 incorporated the Secretary of State's letter of 12th June 1958 it nowhere referred to the advertisement which in their Lordships' opinion cannot therefore in any event be referred to by the appellant in construing the terms of his contract.

However the incorporation of the Secretary of State's letter of 12th June 1958 which stated that allowances were payable at the rates shown in the memorandum necessarily incorporates that document.

The memorandum has a heading "paragraph 3, *Allowances*", but there is no mention under this heading of inducement allowances. Inducement pay is only mentioned incidentally in paragraph 7, "*Widows and Orphans Pensions*", in this form, "the rate of contribution is 5 per cent of salary plus inducement pay, subject to a maximum of $50 per month". It was argued that this paragraph by itself entitled the appellant to inducement pay. Their Lordships do not agree. In their view the proper interpretation of this paragraph is that there is set out the rate of contribution for Widows' and Orphans' Pensions and this rate is fixed at 5 per cent of the salary and, if inducement pay is payable, the contribution will be at the rate of 5 per cent on the additional sum for inducement pay. Their Lordships therefore reach the conclusion that the courts below were right in refusing the appellant his third declaration. The appeal therefore fails.

Their Lordships will accordingly report to the Head of Malaysia their opinion (1) that the order of the High Court of Sarawak dated 10th September 1965 ought to be varied by adding thereto a further recital that the order was made upon the court taking in account that the respondent (defendant) conceded that the appellant (plaintiff) had been a member of Her Majesty's Overseas Civil Service since 1st December 1958; (2) that the order of the Federal Court of Malaysia dated 18th October 1966 ought to be varied so as to provide that the respondent pays the appellant's costs in the High Court of Sarawak; (3) that save as aforesaid the appeal ought to be dismissed and the orders of the High Court and the Federal Court affirmed; (4) that there ought to be no order as to costs before the Board.

Appeal dismissed.

Solicitors: *Hatchett Jones & Co.; Stephenson Harwood Tatham.*

MOHAMED BIN KASDI v. PUBLIC PROSECUTOR

[A.Cr.J. (Ali J.) October 26, 1968]
[Johore Bahru — Criminal Appeal No. 34 of 1968]

Penal Code s. 420 — Cheating — Necessary evidence of deception.

Evidence — Witness making two differing statements — Credibility or otherwise of.

To sustain a charge of cheating there must be evidence of deception practised upon a person who is thereby dishonestly induced to part with his money.

No hard and fast rule can be laid down for determining the credibility or otherwise of a witness, but when a witness gives or makes two statements which differ in material particulars there must necessarily be ground for believing that he is not a truthful witness.

Cases referred to:—

(1) *Khoon Chye Hin* v. *Public Prosecutor* [1961] M.L.J. 105, C.A.

(2) *De Silva* v. *Public Prosecutor* [1964] M.L.J. 81.

MAGISTRATE'S CRIMINAL APPEAL.

Charles N. Mendis for the appellant.

Fong Seng Yee (Deputy Public Prosecutor) for the respondent.

Ali J.: The appellant was convicted by the president, sessions court, Batu Pahat, for an offence of cheating under section 420 of the Penal Code and was sentenced to 4 months' imprisonment.

The prosecution's case briefly was that the appellant had obtained a sum of $200 from the complainant, Hamzah bin Haji Mohamed Som, P.W.3, on a false representation that the money